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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1932.

No. [redacted] 63

A. P. DICKSON, JOE DICKSON, I. N. CALVERT, C. T. DICKINSON AND ERNEST MILLER, PETITIONERS,

VS.

UHLMANN GRAIN COMPANY, A CORPORATION, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT AND SUPPORTING BRIEF.

S. J. JONES,
G. C. JONES,
RICHARD S. RIGHTER,
Counsel for Petitioners.

LATHROP, CRANE, REYNOLDS, SAWYER & MERSEREAU,
Of Counsel.

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UHLMANN GRAIN COMPANY, A CORPORATION, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT AND SUPPORTING BRIEF.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States.

MAY IT PLEASE THE COURT:

Your petitioners, A. P. Dickson, Joe Dickson, I. N. Calvert, C. T. Dickinson and Ernest Miller, respectfully pray for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit, to review a judgment of that court entered February 18, 1932. The transcript of the record in the case has been filed herewith in accordance with rule 38 of this court.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

I.

The Circuit Court of Appeals for the Eighth Circuit has in this case decided an important question of local law in a way in conflict with applicable local decisions, in that the Circuit Court of Appeals, in effect, held that the Grain Futures Act (Sec. 1-17, Title 7, U. S. C. Ann.) nullifies the Missouri Bucket Shop Law (Sections 4316 to 4326, R. S. Mo. 1929) in every case where an order for the purported purchase or sale of grain is transmitted to a "contract market" to be executed, even though the parties intend that no grain shall be delivered, but only that the transaction shall be terminated by a corresponding sale or purchase, all contrary to the decisions of the Supreme Court of Missouri and the Missouri Courts of Appeals in *State* v. *Christopher,* 318 Mo. 225, 2 S. W. (2d) 621; *Price* v. *Barnes,* 300 Mo. 216, 254 S. W. 33; *Conner* v. *Black,* 119 Mo. 126, 24 S. W. 184; *Smith* v. *Bailey,* 200 Mo. App. 627, 209 S. W. 945; *Stewart* v. *Hutchinson,* 120 Mo. App. 32, 96 S. W. 253; *Atwater* v. *Brokerage Co.,* 147 Mo. App. 436, 126 S. W. 823; *McVean* v. *Wehmeier,* 215 Mo. App. 587, 256 S. W. 1085; *Elmore-Schultz Grain Co.* v. *Stonebraker,* 202 Mo. App. 81, 214 S. W. 216.

II.

The Circuit Court of Appeals for the Eighth Circuit has in this case decided an important question of

general law in a way probably untenable in that said Circuit Court of Appeals decided that the Missouri Bucket Shop Law (Sections 4316-4326, R. S. Mo. 1929) did not apply to the purported purchase and sale of grain made by these petitioners because the court found that Uhlmann Grain Company transmitted the orders for purchase and sale given it by petitioners at Carrollton, Missouri, to Kansas City, Missouri, for acceptance and, if accepted, were then transmitted to Chicago, Winnipeg and Minneapolis, and therefore that the transactions constituted interstate commerce, and came solely within the scope of the Grain Futures Act, and for that reason were not and could not be gambling or wagering contracts under the Missouri Bucket Shop Law, notwithstanding the fact that no delivery was intended and the transactions were to be closed by market differences.

III.

The Circuit Court of Appeals for the Eighth Circuit has in this case decided an important question of federal law, which has not been, but should be settled by this court, in this, that this case presents the question how far and to what extent, if at all, the Federal Grain Futures Act supersedes, annuls or repeals state laws, particularly those of the State of Missouri, relating to dealings in grain futures and the operation of bucket shops.

THE FACTS.

On or about the 8th day of November, 1929, the Uhlmann Grain Company, a corporation, filed several suits at law in the United States District Court for the Western Division of the Western District of Missouri to recover of petitioners certain sums of money which it alleged to be due it for commissions on purchases and sales of wheat made on the Kansas City, Chicago, and Winnipeg grain markets. The petition is in conventional form (R. 2).

The amended answers of the defendants (R. 8) denied generally that defendants are indebted to plaintiff in any sum or upon any item alleged in the petition, and further alleged by way of affirmative defense that all of the transactions engaged in were purely fictitious, a mere form and pretense; that said transactions were gambling transactions; that they were illegal and violated the laws of the State of Missouri, and that said claims were not enforceable; and further alleged that there was no intention to accept delivery when defendants purported to purchase grain, or to make delivery when they purported to sell it; and that their gains and losses were to be ascertained by the fluctuations in the market prices of the grain; also alleging that the plaintiff operated a bucket shop in the town of Carrollton where defendants lived, in violation of the Missouri statute.

The reply of plaintiff to defendants' amended answers alleged that the accounts sued on represented

advancements made and commissions earned by the Uhlmann Grain Company on account of the defendants in transactions in grain futures on various boards of trade, and that such transactions were executed and carried out in compliance with the Federal Grain Futures Act (R. 11).

By stipulation entered into in writing (R. 7) a jury was waived and all of the cases consolidated.

In the early part of the year 1924, the Uhlmann Grain Company, in the Town of Carrollton, containing a population of approximately thirty-two hundred, opened a branch office in the basement of the Florence Hotel and installed therein roll-top desks, chairs, blackboard, telegraph instruments, and equipped it with a private telegraph wire communicating with its Kansas City office; and placed in charge of the Carrollton office one E. S. McDonough as its agent and representative (R. 67-112-137). McDonough had full authority to represent the Uhlmann Grain Company. It was his duty to receive orders from Carrollton customers, transmit them over the private telegraph wire *to its office in Kansas City;* likewise it was his duty to solicit customers, which he did, and in a short time he had succeeded in gathering together between forty and fifty customers, none of whom in any way was engaged in the grain business (R. 70-152). These were engaged in various avocations of life, such as ice dealer, employee in printing office, farmers, farmer's wife, laundryman's wife, insurance agent, country merchant, undertaker's employee (R. 115-167-168). Some had no special occupation.

The method of dealing was purely marginal trading. Millions of bushels of grain purported to have been dealt in, but not a single bushel was ever delivered (R. 133-154-156-158). The profits and losses were determined by an ascertainment of the difference in the prices at which the grain was purported to have been bought, and the prices at which it was purported to have been sold (R. 70-134-139).

The financial standing of the defendants was such that none of them could have received and paid for the grain which they purported to have purchased; nor could they have delivered the grain which they purported to sell (R. 158-167), all of which the Grain Company well knew.

The trial judge after hearing all of the evidence found in favor of the defendants (R. 16), and in his findings of fact expressly found that the transactions were all fictitious; that none was actually executed between clearing members of the exchange, and that in all the transactions plaintiff bet with its customers, took the other side of the deal (see Findings of Fact, 10-11, R. 18).

The Uhlmann Grain Company carried the case by appeal to the Circuit Court of Appeals for the Eighth Circuit. Two of the judges concurred in reversing and remanding the cause (Opinion R. 99, Order R. 217), while the third judge dissented (R. 216). The petitioners in due time filed a petition for rehearing in that court (R. 217), which was overruled and denied on March 21, 1932 (R. 220). Petitioners now seek a writ of certiorari from this court to review the majority opinion of said Circuit Court of Appeals.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

This case involves an important question of local law and an important question of general law in this, that the State of Missouri, in common with most of the other states of the Union, has a series of statutes known as "Bucket Shop Laws" which render unlawful transactions such as those which occurred in this case. The question is therefore presented whether or not the Grain Futures Act (as the Court of Appeals for the Eighth Circuit held in this case) in large measure annuls and supersedes those state statutes and whether such purported contracts are now, under the Grain Futures Act, valid and binding, notwithstanding under the Missouri statutes they are unlawful. This question has never been decided by this court and has never before been decided by any Circuit Court of Appeals. The decision of the Circuit Court of Appeals, holding the Missouri Bucket Shop Law inapplicable to these transactions, is, as we read the law, directly in conflict with the express ruling of the Supreme Court of the State of Missouri interpreting and applying the Missouri Bucket Shop Law to a state of facts almost identical with those in this case (*State* v. *Christopher*, 318 Mo. 225, 2 S. W. (2d) 621).

There is, therefore, inherent in this controversy an apparent conflict between the jurisdiction of a federal statute, the Grain Futures Act, and a state statute, the Missouri Bucket Shop Law. The Missouri Supreme

Court held that the Federal Grain Futures Act does not abrogate or invade the province of the Missouri Bucket Shop Law. The Circuit Court of Appeals for the Eighth Circuit has held in this case that the Grain Futures Act in effect practically nullifies the Missouri Bucket Shop Law.

The Supreme Court of the State of Ohio, in construing an Ohio statute of almost exactly the same import as the Missouri Bucket Shop Law, has also held on facts almost identical with those here that the Federal Grain Futures Act does not limit the application or effect of the Ohio Bucket Shop Law. *C. A. King & Co.* v. *Horton,* 116 Ohio State 205, 156 N. E. 124.

Moreover, the United States District Court for the Northern District of Georgia, in the case of *Fenner* v. *Boykin,* 3 Fed. (2d) 674, in construing and applying the Georgia Bucket Shop Law, held that its effect and application was in nowise limited in relation to the transactions there in issue (which were similar to those here) by the Federal Grain Futures Act.

There is, therefore, a conflict between the decision of the Circuit Court of Appeals for the Eighth Circuit in this case and the opinions of the Missouri Supreme Court, the Ohio Supreme Court and the District Court for the Northern District of Georgia on the construction and application of a local law in relation to the construction, application and effect of a federal law, the Federal Grain Futures Act. The question of the effect of the State Bucket Shop Law is a question of local law; the question of the effect and application of

the Federal Grain Futures Act is a question of general law—both are directly in issue here.

The case was heard before three judges of the Court of Appeals. The main opinion was written by Judge Gardner. A concurring opinion was written by Judge Van Valkenburgh "in view," to use his own language, "of the importance of the question at issue, affecting, as it does, a very necessary unit in our industrial life." A vigorous dissenting opinion was filed by Judge Kenyon, in which he branded the transactions disclosed by the evidence in this case as "fictitious operations" and "gambling transactions" (R. 216). The learned dissenting judge held "the fact that they may be termed 'dealings in futures' sanctioned by the Federal Grain Futures Act does not remove the odor of bucket shop transactions surrounding them," thereby in effect holding that the Grain Futures Act did not abrogate or annul the Missouri statutes relating to bucket shops and grain gambling.

Thus the situation presented by this petition is one where, on an important question of local law and an important question of general law, the majority opinion of Judges Gardner and Van Valkenburgh is directly in conflict with the opinion of the learned trial judge (R. 192), the dissenting opinion of Judge Kenyon, the ruling of the Missouri Supreme Court in *State* v. *Christopher, supra,* the ruling of the Ohio Supreme Court in *King* v. *Horton, supra,* and the ruling of the District Court for the Northern District of Georgia in *Fenner* v. *Boykin, supra.*

We respectfully submit that the action of the Circuit Court of Appeals for the Eighth Circuit in limiting and practically nullifying the Missouri Bucket Shop Law, contrary to the express ruling of the Missouri Supreme Court on similar facts, presents a question which this court ought by all means to review.

We further respectfully submit that the interpretation and application of the Federal Grain Futures Act by the Circuit Court of Appeals for the Eighth Circuit in such a way that speculation in grain futures constitutes interstate commerce where orders are sent to other states to be filled (even tho no grain is intended by the parties to be delivered), and consequently in such a way as to nullify the effect of the Missouri Bucket Shop Law upon such transactions, presents an important question of general law which this court should review.

Wherefore, your petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this court, directed to the United States Circuit Court of Appeals for the Eighth Circuit, commanding that court to certify to and send to this court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket, Number 9119, Uhlmann Grain Company, Appellant, vs. A. P. Dickson, *et al.*, appellees; and that said case be reviewed and determined by this court as provided by Section 240 of the Judicial Code; and that

said judgment of said Circuit Court of Appeals in said case, and every part thereof, may be reviewed by this court, and that your petitioners may have such other or further relief or remedy in the premises as this court may deem appropriate.

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Attorneys for Petitioners, A. P. Dickson, Joe Dickson, I. N. Calvert, C. T. Dickinson and Ernest Miller.

LATHROP, CRANE, REYNOLDS, SAWYER & MERSEREAU,
Of Counsel.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Opinions Below.

The two majority opinions (R. 199 and 211), as well as the dissenting opinion, of the Circuit Court of Appeals (R. 216) appear in connection with the transcript of record filed herein. The opinions in the offered reports appear at 56 Fed. (2d) 525. The opinion of the trial judge appears at page 192 of the record, and his findings of fact at page 16.

Jurisdiction.

The judgment of the Circuit Court of Appeals now sought to be reviewed was entered on February 18, 1932, and appears at record page 217. The jurisdiction of this court is invoked under Section 240a of the Judicial Code (U. S. Code, Title 28, Sec. 344).

Statement.

The principal facts have already been stated in the petition.

ARGUMENT.

This case involves the important question of how far and to what extent the Federal Grain Futures Act (Title 7, U. S. C. Ann., Secs. 1 to 17, inc.) has invaded the domain of state legislation on the subject of grain

gambling, marginal dealing in grain, speculations on the rise and fall of the markets, and declaring contracts to be wagering or gambling contracts where no delivery was intended and where the transactions were to be closed by an ascertainment of the difference between the price of the grain at which it was contracted for and that at which it was purported to be sold and, generally, the operation of "bucket shops."

The State of Missouri has legislated extensively on these subjects (R. S. Mo. 1929, Secs. 4316 to 4326, inc.). On account of the length of these statutes, they are printed in an appendix hereto (p. 23). The question is, did the Federal Grain Futures Act, *supra*, repeal, annul or supersede these sections of the Missouri statutes? The Federal District Judge who heard the case ruled that it did not (R. 192, l. c. 194). The learned dissenting circuit judge in this case ruled that it did not (R. 216). The Supreme Court of Missouri, in *State* v. *Christopher*, 318 Mo. 225, 2 S. W. (2d) 621, the Supreme Court of the State of Ohio in *King* v. *Horton*, 116 Ohio State 205, 156 N. E. 124, and the Federal District Court of the Northern District of Georgia in the case of *Fenner* v. *Boykin*, 3 Fed. (2d) 674 (affirmed 271 U. S. 242, 70 L. Ed. 927) ruled that it did not.

The question as to the application of the Federal Grain Futures Act and its effect upon the Missouri Bucket Shop Law was before the Supreme Court of Missouri in *State* v. *Christopher, supra*, a prosecution by the state for violation of the Missouri Bucket Shop Law. The case was submitted on an agreed statement

of facts and so strikingly similar are they to the facts in the case at bar that we state them in substance as follows:

The defendant was a member of the Boards of Trade in Kansas City and Chicago and such Boards of Trade were contract markets under the Federal Act; the defendant was engaged in the business of buying and selling grain on commissions for numerous customers for future delivery; the defendant maintained an office in Sedalia, Missouri, in charge of an agent; that defendant furnished market quotations for his Sedalia office over the telegraph wire from Kansas City which, (as in this case) were placed on the blackboard in the office; that defendant's agent received orders for the purchase of grain to be executed on the Kansas City or Chicago Board of Trade as directed by the customer; that the agent (as in this case) transmitted such orders to Kansas City for acceptance; that such orders if accepted were executed on the Kansas City Board of Trade or transmitted by wire for execution on the Chicago Board of Trade, the bulk of the business being done on the Chicago Board of Trade; that after the execution of the trade the customer would be duly notified within a few days by mail of the trade, this being sent from defendant's Kansas City office. The transactions (as in this case) were all designated by number; in short, Christopher had at Sedalia the same equipment that the defendant in this case had at Carrollton, and the dealing was done in the same way; practically all of the transactions were conducted on margin; it was admitted that a large majority of the

persons engaged in these trades were not engaged in the grain business, but were in the transactions for the purpose of gain; it was further admitted that there was no physical delivery of the grain, but all the trades were offset by subsequent sales or subsequent purchases, the same as plaintiff claims was done in this case; it was further admitted that all orders received at Sedalia were actually executed by the defendant upon the exchange, subject to the rules of the exchange. So claims the plaintiff in this case. The orders which the court said were actually executed on the exchange, subject to the rules of the exchange, were confirmed by notice sent out from the Kansas City office; that notice of confirmation was exacly like the notice which was sent out to the customers in the case at bar. The defendant was fined $1,000.00, from which he prosecuted an appeal to the Supreme Court of Missouri. Judge White wrote the opinion of the court sitting *in banc.* One of the questions presented was whether or not Congress by the enactment of the Grain Futures Act had invaded the domain of state legislation on that subject. The court held that it did not, and further, l. c. 627 of the opinion, said: "By all the definitions of 'bucket shop,' the place maintained by the defendant in Sedalia was a bucket shop."

A quotation from the syllabus of the case discloses in condensed form the nature of the court's decision. It reads in part as follows:

"7. SALES ON MARGIN: INTERSTATE COMMERCE: GRAIN FUTURES ACT. The negotiations forbidden by Section 4 of the Grain Futures Act (42 U. S. Stat.

998) do not necessarily constitute deals in interstate commerce. Transactions are not the subjects of interstate commerce simply because they are negotiated between citizens of different states, where the contract itself is to be completed and carried out wholly within the borders of a state, although such contract may incidentally affect interstate commerce.

"8. .....: .....: .....: TRANSACTIONS REMOTE FROM CONTRACT MARKET. The purchase of grain upon margin at a place maintained by defendant in Sedalia, through an agent who wires the purchase to defendant at Kansas City, where he is engaged in buying and selling grain on the board of trade for future delivery, has nothing to do with interstate commerce, although the order for the purchase be executed on the board of trade at Chicago; nor does such a transaction come within the terms of the Grain Futures Act of Congress (42 U. S. Stat. 998). A bucket-shop maintained at Sedalia is not a contract market maintained at Kansas City, within the meaning of said federal statute.

"9. .....: .....: .....: .....: MISSOURI STATUTE: PLACE. To keep and maintain a place in Sedalia where defendant's agent receives orders for the purchase of grain upon margin, with no intention to deliver the grain so sold, and wires them to defendant at Kansas City, where defendant executes them upon the board of trade, or executes them by wire upon a board of trade in a city in another state selected by the purchaser, is unlawful under the Missouri statute (Sec. 3574, R. S. 1919) which makes it a misdemeanor to keep, or cause to be kept, a place wherein is conducted or permitted the pretended buying of grain on margin, when the party selling does not intend to deliver, or the purchaser does not intend to receive, the grain sold and bought; and as to such transactions, said

statute was not supplanted by the Grain Futures Act of Congress. The Missouri statute forbids the keeping of such a place; the Act of Congress forbids the transmission of such orders in interstate commerce."

Other Missouri decisions which support the ruling in *State* v. *Christopher, supra,* and uphold the Missouri Bucket Shop Law are:

Price v. *Barnes,* 300 Mo. 216, 254 S. W. 33.
Conner v. *Black,* 119 Mo. 126, 24 S. W. 184.
Smith v. *Bailey,* 200 Mo. App. 627, 209 S. W. 945.
Stewart v. *Hutchinson,* 120 Mo. App. 32, 96 S. W. 253.
Atwater v. *Brokerage Co.,* 147 Mo. App. 436, 126 S. W. 823.
McVean v. *Wehmeier,* 215 Mo. App. 587, 256 S. W. 1085.
Elmore-Schultz Grain Co. v. *Stonebraker,* 202 Mo. App. 81, 214 S. W. 216.

In the case of *C. A. King & Co.* v. *Horton,* 116 Ohio St. 205, 156 N. E. 124, the question of the application of the Grain Futures Act and its relation to the Ohio Bucket Shop Law was involved, that is, the question whether the Grain Futures Act superseded and annulled the Ohio Bucket Shop Law. (The Ohio Bucket Shop Law was in all essential particulars the same as the Missouri Bucket Shop Law.) So far as the opinion discloses, the facts appear to be essentially similar to the facts in the case at bar and in the Christopher case, *supra.* The court expressly held, without regard to whether the transaction was ultimately consummated on a contract market beyond the borders of the state, that trading in grain futures

which did not contemplate an actual delivery of the commodity but a mere completion of the transaction by a corresponding sale or purchase was not interstate commerce and therefore that the Federal Grain Futures Act did not prohibit such a transaction from being unlawful in Ohio under the Ohio Bucket Shop Law. Syllabus number 6 in the Northeastern Reporter fairly summarizes the court's ruling:

> An executory contract, made in the State of Ohio between persons in the State of Ohio, which the party paying or to pay does not intend to complete by receiving or delivering the whole of that which is so contracted for, but to resell before the time fixed by contract for such delivery, or at such time to pay or receive the difference between the contract price and the market price, is not a transaction in interstate commerce.

Such under the facts was the situation in the case at bar.

It will be noted that some reliance has been placed upon the case of *State ex rel. Burnett* v. *Rosenbaum Grain Co.*, 115 Kans. 40, 222 Pac. 80, as holding that the Grain Futures Act did supersede the Kansas statutes on the subject of bucket shops. The Supreme Court of Kansas having so held necessarily brings about a conflict of state decisions on the subject here discussed; that is to say, the Kansas Supreme Court is in conflict with both the Missouri Supreme Court in the Christopher case, *supra*, and the Ohio Supreme Court in the King case, *supra*, and likewise is in conflict with the case of *Fenner* v. *Boykin*, 3 Fed. (2d) 674.

The case of *Fenner* v. *Boykin, supra,* was a suit brought for citizens of other states than Georgia, brokers and members of cotton exchanges in New York, New Orleans and Chicago who operated an office in Fulton County, Georgia, to enjoin the enforcement of statutes of the State of Georgia similar to those of the State of Missouri on the subject of bucket shops. The modes of dealing, executing orders, closing out contracts and making settlements between the brokers and the customers were almost identical with those in the case at bar. It was held by that court that such transactions were not interstate commerce and that the prohibitory statutes of Georgia were not superseded by the federal law on the subject. We quote from the opinion as follows (l. c. 677):

> Transactions such as are here condemned are not commerce at all and if carried on across state lines are not sanctified thereby. They are not interstate commerce, but interstate gambling. *Alex* v. *State,* 86 Ga. 246, 12 S. E. 408, 10 L. R. A. 859.

It has long since been recognized that the operation of bucket shops is a public evil, a menace to morals and to the general welfare and should be prohibited (*Western Union Telegraph Co.* v. *Hammond,* 3 L. R. A. (N. S.) 153 (Ind. 76 N. E. 100). Many, if not all of the states of the Union, in the exercise of their valid *police power,* have legislated against such practices, and such power of the states to so legislate has been expressly upheld and sustained in *House* v. *Mayes,* 219 U. S. 270, 55 L. Ed. 213; *Chicago, B. & Q. Ry. Co.* v. *Illinois,* 200 U. S. 561, 50 L. Ed. 596.

It is clear, therefore, that if, as petitioners contend, the effect of the opinion of the Circuit Court of Appeals for the Eighth Circuit in the case at bar is to limit and curtail the valid exercise by the state of its *police power* by classifying as interstate commerce that which is not, then the opinion of the Court of Appeals is plainly wrong and in conflict with the above decisions of this court and ought to be set aside.

It is, of course, plain, and the opinion of Judge Gardner in this case holds, that the Federal Grain Futures Act does not legalize wagering on the fluctuation in the price of grain if that was previously illegal. It is equally plain, and was not seriously disputed by appellant in the courts below, nor does the Circuit Court of Appeals deny, that if the Missouri Bucket Shop Law is enforceable in this case it voids the transactions here in question. It seems plain that this court has expressly held such wagering on the fluctuations in the market, as the evidence in this case discloses, to be gambling or wagering transactions. *Irwin* v. *Williar,* 110 U. S. 499, 508, 28 L. Ed. 225; *Embrey* v. *Jemison,* 131 U. S. 336, 33 L. Ed. 132; *Clews* v. *Jamieson,* 182 U. S. 461, 45 L. Ed. 1183.

In *Chicago Board of Trade* v. *Christie,* 198 U. S. 236, 49 L. Ed. 1031, this court said, l. c. 249:

> "Purchases *made with the understanding that the contract will be settled by paying the difference between the contract and the market price* at a certain time, *Embrey* v. *Jemison,* 131 U. S. 336; *Weare Commission Company* v. *People,* 209 Ill. 528, stand on different ground from purchases made merely

with the expectation that they will be satisfied by set-off'' (italics ours).

The decision in that case deals with an entirely different situation from that disclosed by the facts in this case, for here the evidence expressly disclosed that it was contemplated and intended by the parties that there should be no delivery of the commodity purchased or sold but that each transaction should be terminated by an ascertainment of the difference in the market price at which the grain was contracted for and at which it was sold—a situation which stands on quite a different footing from that countenanced by the opinion of Mr. Justice Holmes in the Christie case.

Consequently, under the decisions quoted, the parties in this case were engaged in wagering or gambling contracts; such contracts are declared void by the Missouri Bucket Shop Law; the Federal Grain Futures Act does not declare them valid. It necessarily follows that the Federal Grain Futures Act does not, and in the nature of things cannot, give validity to transactions declared void by the Missouri law, and the opinion of the majority of the Circuit Court of Appeals in this case to the contrary is wrong.

Conclusion.

We respectfully urge that the situation presented by this case is of such importance, the opinions of Judge Gardner and Judge Van Valkenburgh in this case are so clearly contrary to sound principle and so plainly infringe upon the police power of the state

exercised under the evidence here in the State's own proper sphere, that we respectfully request this Honorable Court to take jurisdiction in this case, grant the writ of certiorari herein prayed for, and resolve the questions herein presented, or rather suggested, on the merits.

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Of Counsel.

APPENDIX.

Section 4316, Vol. I, Revised Statutes of the year 1929, and which appeared in the Revised Statutes of Missouri for the year 1919 as Section 3564, provides as follows:

> "Whoever, as principal, or as agent of any corporation or person or persons, shall set up and carry on a 'bucket shop,' or any person who shall accept employment from any person or persons, or corporations engaged in carrying on a bucket shop, and shall under such employment in any manner or capacity assist in the carrying on of a bucket shop, shall be guilty of a felony."

Section 4317, Revised Statutes for the year 1929 which appeared in the Revised Statutes of Missouri for the year 1919 as Section 3565, provides as follows:

> "A bucket shop, in the meaning of the preceding section, is a place wherein the person carrying on the bucket shop, then and there, either as principal or agent, pretends to buy or sell, or goes through the form of buying and selling, to or for any other person or persons, stock, bonds, petroleum, cotton, grain, provisions and other commodities, or any one or more of the same, at prices fixed or pretended to be fixed by trades or transactions made or offered to be made in same on boards of exchange or otherwise, but wherein there is in fact no actual purchase and sale, or sale and purchase of such commodity for or on account of the party or parties thereto."

Section 4318, Revised Statutes of Missouri for the year 1929, which appeared in the Revised Statutes of Missouri for the year 1919 as Section 3566, provides as follows:

> "All pretended purchases and sales or contracts and agreements for the pretended purchase and sale of the commodities aforesaid, in manner aforesaid, wherein there is, in fact, no actual purchase and sale or sale and purchase of such commodities for or on account of the party or parties thereto, are hereby declared gambling and criminal acts, whether the order or contract for the pretended purchase or sale of such property purports to be offered, accepted, executed or consummated in this state or in any other state or country: Provided, the offer to make such pretended purchase or sale of said property is placed or given or communicated from this state; and any person violating the provisions of this section shall be guilty of a felony."

Section 4319, Revised Statutes of Missouri for the year 1929, which appeared in the Revised Statutes of Missouri for the year 1919 as Section 3567, provides as follows:

> "It shall be unlawful for any corporation, copartnership, person or persons in the control of or engaged in the operation or conduct, as owner or lessee, of any telegraph or telephone lines to transmit or permit to be transmitted over their said lines in this state any message or communication conveying any order or contract for the pretended purchase and sale, or sale and purchase, of any such commodity or any acceptance or confirmation thereof. And any person whether acting individually or as an officer, member, agent, or employee of any corporation, association or co-

partnership, who violates the provisions of this section shall be guilty of a felony."

Section 4320, Revised Statutes of Missouri for the year 1929, which appeared in the Revised Statutes of Missouri for the year 1919 as Section 3568, provides as follows:

"It shall not be necessary, in order to commit the offense defined in the four preceding sections, that both the buyer and seller, or both the parties pretending to buy and sell the said commodities, shall agree to do any of the acts herein prohibited, but the said crime shall be complete against any person acting individually, or as an officer, member, agent, or employee of any person, corporation, association, or copartnership thus pretending or offering to sell, or thus pretending or offering to buy, whether the offer to sell or buy is accepted or not; and any person acting individually, or as an officer, member, agent or employee of any person, corporation, association or copartnership who shall communicate, receive, exhibit, or display in any manner, any such offer to buy or sell, or any statements or quotations of the prices of any such property, with a view to any such transaction as aforesaid, shall, for each such offense, be deemed and held to be an accessory thereto, and be guilty of a felony."

Section 4321, Revised Statutes of Missouri for the year 1929, and which appeared in the Revised Statutes of Missouri for the year 1919 as Section 3569, is as follows:

"It shall be the duty of every commission merchant, copartnership, association, corporation or broker, doing business as such, to furnish to every customer or principal for whom such com-

> mission merchant, broker, copartnership, corporation or association has or pretends to have executed any order for the purchase or sale of any of the commodities hereinbefore mentioned, either for immediate or future delivery, a written statement containing the names of the parties from whom any such property was bought, or to whom it shall have been sold, as the case may be, the same when, the place where, and the price at which the same was either bought or sold; and in case such commission merchant, broker, copartnership, corporation or association shall refuse promptly to furnish such statement upon reasonable demand, the fact of such refusal shall be *prima facie* evidence that such property was not sold or bought in a legitimate manner upon the open market, but was in violation of the five preceding sections, and such fact shall be competent evidence in any criminal prosecution brought for a violation of such sections."

Section 4322, Revised Statutes of Missouri for the year 1929, and which appeared in the Revised Statutes of Missouri for the year 1919 as Section 3570, provides as follows:

> "Any person guilty of a violation of the six preceding sections shall be deemed guilty of a felony, and upon conviction, shall be punished by imprisonment in the penitentiary for not less than two nor more than five years, or by imprisonment in the county jail for not less than six nor more than twelve months."

Section 4323, Revised Statutes of Missouri for the year 1929, which appeared in the Revised Statutes of Missouri for the year 1919 as Section 3571, is as follows:

"Whoever knowingly permits any of the gambling acts aforesaid in his or their building, house or in any outhouse, booth, arbor, or erection of which he or they have the care and possession, shall be fined not less than five hundred dollars nor more than fifteen hundred dollars for each and every offense, and any penalty so adjudged shall be a lien upon premises on or in which such unlawful acts are carried on or permitted. It is the intention of Sections 4316 to 4322 inclusive, to prevent and prohibit within this state any person, corporation or association or copartnership from dealing in, by either selling or purchasing, any stocks, bonds, article or commodity when an actual delivery is not contemplated, and each and every day the unlawful business prohibited by said sections is carried on shall constitute a separate offense, and all contracts made in violation of said sections shall be considered gambling contracts, and shall be void; all fines collected under the provisions of said sections shall be paid to the state treasurer, and shall become a part of the common school fund of this state. If default is made in the payment of any fine mentioned in said sections, the person so defaulting shall be imprisoned in the county jail not less than six nor more than twelve months."

Section 4324, Revised Statutes of Missouri for the year 1929, which appeared in the Revised Statutes of Missouri for the year 1919 as Section 3572, is as follows:

"All purchases and sales or pretended purchases and sales, or contracts and agreements for the purchase and sale, of the shares of stocks or bonds of any corporation, or petroleum, provisions, cotton, grain or agricultural products whatever, either on margin or otherwise, without any intention of receiving and paying for the property

so bought, or of delivering the property so sold, and all the buying or selling or pretended buying or selling of such property on margins or on optional delivery, when the party selling the same, or offering to sell the same, does not intend to have the full amount of the property on hand or under his control to deliver upon such sale, or when the party buying any of such property or offering to buy the same does not intend actually to receive the full amount of the same if purchased, are hereby declared to be gambling and unlawful, and the same are hereby prohibited. Any company, copartnership or corporation, or member, officer or agent thereof, or any person found guilty of a violation of the provisions of this section, shall be fined in a sum not less than three hundred dollars nor more than three thousand dollars."

Section 4325, Revised Statutes of Missouri for the year 1929, which appeared in the Revised Statutes of Missouri for the year 1919 as Section 3573, is as follows:

"It shall not be necessary, in order to commit the offense defined in the preceding section, that both the buyer and seller shall agree to do any of the acts above prohibited, but the said offense shall be complete against any corporation, association, copartnership or persons thus pretending or offering to sell, or thus pretending or offering to buy, whether the offer to sell or buy is accepted or not; and any corporation, association, copartnership, or person, or agent thereof, who shall communicate, receive, exhibit or display in any manner any such offer to buy or sell, or any statements or quotations of the prices of any such property, with a view to any such transaction as aforesaid, shall, for each such offense, be deemed and held to be an accessory thereto, and, upon

conviction thereof, shall be fined the same as the principal; and any such corporation, association, copartnership or person or agent permitting any such communication, reception, exhibit or display shall, for every such offense, be fined a sum not less than three hundred dollars nor more than two thousand dollars."

Section 4326, Revised Statutes of Missouri for the year 1929, which appeared in the Revised Statutes of Missouri for the year 1919 as Section 3574, is as follows:

"It shall be unlawful for any corporation, association, copartnership or person to keep or cause to be kept in this state, any office, store or other place wherein is conducted or permitted the pretended buying or selling of the shares of stocks or bonds of any corporation, or petroleum, provisions, cotton, grain or agricultural products whatever, either on margins or otherwise, without any intention of receiving and paying for the property so bought, or of delivering the property so sold, or wherein is conducted or permitted the pretended buying or selling of such property on margins, when the party selling the same, or offering to sell the same, does not intend to have the full amount of property on hand or under his control to deliver upon such sale, or when the party buying any of such property, or offering to buy the same, does not intend actually to receive the same if purchased, or to deliver the same if sold; and the keeping of all such places is hereby prohibited; and any person, company, copartnership or corporation, or officer or agent thereof, that shall be guilty of violating this section, shall upon conviction thereof, be fined in a sum not less than five hundred dollars nor more than five thousand dollars."